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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
■ Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE STATE OF PALESTINE

■

PUBLIC

Amicus Curiae Submissions of the Israel Bar Association

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Pursuant to decision ICC-01/18-63 of 20 February 2020 and Rule 103(1) of the Rules of Procedure and Evidence (“the Rules”), the Israel Bar Association (“the Applicant”) hereby presents its observations with a view to assisting Pre-Trial Chamber I of the International Criminal Court (“the Court”) in the determination of the jurisdictional issue set out in paragraph 220 of the *“Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine”*¹ (“the Prosecutor’s Request”).

Summary

1. The Applicant submits that the basis for the Prosecutor’s findings that the Court may exercise jurisdiction over a Palestinian referral are fundamentally flawed; (i) the mere fact of Palestine’s accession to the Rome Statute, assuming that such accession was even valid, is not sufficient for it to be regarded as a “State” for the purpose of Article 12(2)(a) of the Rome Statute; (ii) Palestine cannot be regarded, in the alternative, as a “State” *“for the strict purposes of the [Rome] Statute only”*, and; (iii) Palestine cannot delegate jurisdiction to the International Criminal Court which it (Palestine) has never acquired.

(i) *Palestine’s accession to the Rome Statute, per se, is insufficient for it to be regarded as a “State” for the purpose of Article 12(2)(a) of the Rome Statute*

2. For reasons which will be expanded upon below, the Applicant submits that the referral communicated to her by the Palestinian authorities was null and without legal effect. Furthermore, when the Prosecutor transmitted the referral to the Presidency pursuant to Regulation 45(1) of the Regulations of the Court (RoC), she acted *ultra vires*. The more appropriate course of action would have been for the

¹ ICC-01/18-12.

Prosecutor to have sought a preliminary ruling pursuant to RoC 46(3) as a “*matter not arising out of a situation*”, as she did in the *Bangladesh/Myanmar* scenario. By transmitting the Palestine referral to the Presidency, however, the Prosecutor took a step, unwittingly or not, which could only be taken with respect to a validly referred situation – the very question *sub judice*. The Prosecutor’s argument therefore that the Article 19(3) considerations of the Pre-Trial Chamber in *Bangladesh/Myanmar* are distinguishable in the present scenario in light of the *Decision on Information and Outreach for Victims of the Situation*,² is incongruous since it is through the Prosecutor’s own legal error that this learned Pre-Trial Chamber has been seized of a “Situation” which is void *ab initio*.

3. In any event, the Prosecutor’s argument that accession to the Rome Statute is sufficient for Palestine to be regarded as a “State” pursuant to Article 12(2)(a) of the Rome Statute sets the proverbial cart before the horse. Put otherwise, to assert that the actions of a treaty depositary such as the United Nations Secretary General can obviate the need for “*a separate assessment of Palestine’s status ([or] of its Statehood) from that which was conducted when Palestine joined the Court*”³ presumes a finding which is inconsistent with the Court’s own statute and even the present litigation which – for right or wrong – is now engaged on that very same “*separate assessment*”.

4. The Applicant submits that Palestine’s accession to the Rome Statute was a mere administrative act which, in itself, is insufficient to constitute a valid basis for the delegation of the sovereign ability to prosecute its own nationals or those of other States. Although Palestine has, over recent years, participated in the work of the Assembly of State Parties, such participation, as clarified by former President Tiina

² ICC-01/18-2. See, also, ICC-01/18-12 at para. 32: “*In addition, since the Court is already active in the situation in Palestine and the Prosecution stands prepared to open an investigation, a decision by the Chamber would not be an abstract ‘advisory opinion.’ Rather, it would be a decision on jurisdiction that would concretely advance the proceedings*”.

³ ICC-01/18-12 at para. 7.

Intelmann, was subject to *“the Rules of Procedure of the Assembly independently of and without prejudice to decisions taken for any other purpose, including decisions of any other organization or organs of the Court regarding any legal issues that may come before them”*.⁴ Whether or not Palestine is a State and has the sovereign ability to delegate jurisdiction is just such a “legal issue” envisaged by the ASP President and the technical fact of accession cannot lead to the automatic conclusion that Palestine is now competent to refer situations over its asserted territory.

5. The Applicant finds support for this position in a press release issued by the Office of the Secretary-General of the United Nations on 7 January 2015:

- *“Many reporters have been asking about the documents transmitted by the Permanent Observer of Palestine to the United Nations relating to the accession of Palestine to 16 multilateral treaties in respect of which the Secretary-General is the depositary, including the Rome Statute of the International Criminal Court.*
In conformity with the relevant international rules and his practice as a depositary, the Secretary-General has ascertained that the instruments received were in due and proper form before accepting them for deposit, and
- *has informed all States concerned accordingly through the circulation of depositary notifications. The information is public and posted on the website of the UN Treaty Section (<https://treaties.un.org/pages/CNs.aspx>).*
This is an administrative function performed by the Secretariat as part of the Secretary-General’s responsibilities as depositary for these treaties.
It is important to emphasize that it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General” [emphasis added].⁵

6. While a number of ICC State Parties, including Australia, Canada, Germany, the Netherlands and the United Kingdom, subsequently expressed official reservations with respect to the legal effects of Palestine's purported accession to the

⁴ ICC-ASP/13/20 Vol.1 at para. 5.

⁵<https://www.un.org/sg/en/content/sg/note-correspondents/2015-01-07/note-correspondents-accession-palestine-multilateral>

Rome Statute,⁶ it is also important to note that a significant number of States had previously expressed reservations in light of UNGA Resolution 69/17 (upon which the Secretary-General had relied for the purposes of circulating the Palestinian instruments), stating that the adoption thereof did not entail the recognition of Palestinian statehood.⁷ Furthermore, and as a matter of international law, the absence of express objection by any State to a purported accession to the Rome Statute by another party cannot be taken to imply acquiescence. This is now clearly confirmed by the proposed *amici curiae* interventions of as many as seven State Parties, including those that had not previously made express remarks in this regard. Some of these States proffer official views challenging the validity of Palestine's status as a State Party to the Rome Statute,⁸ while others clarify that regardless of such status, they do not consider Palestine to be a State under international law and that accession by itself is insufficient to establish the Court's jurisdiction.⁹

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(ii) *Palestine is not a State “for the strict purposes of the Statute only”*

7. In the alternative, the Prosecutor argues that Palestine may be considered a State “for the purposes of the Rome Statute under the relevant principles and rules of international law”.¹⁰ At the same time, however, the Prosecutor advocates a “case-specific application” of the four well-established Montevideo Convention criteria arguing, *inter alia*, that although Palestine does not have the requisite control over the relevant territory, such “shortcomings” should not be dispositive for the Court’s purposes.¹¹ A comprehensive critical analysis of Palestine’s pretensions to statehood

⁶ See The Memorandum of the Israel Attorney-General, pp.4-5 at footnote 5, and p.28 at footnote 109. <https://mfa.gov.il/MFA/PressRoom/2019/Documents/ICCs%20lack%20of%20jurisdiction%20over%20so-called%20%E2%80%9Csituation%20in%20Palestine%E2%80%9D%20-%20AG.pdf>

⁷ Stipulations made by France, Italy, Malaysia, the Netherlands, Tunisia, and the UK.

⁸ Including the Federal Republic of Germany and Australia (with the latter expressly stating that it does not have any relationship with the “State of Palestine” under the Rome Statute).

⁹ The Czech Republic, the Republic of Austria, the Federative Republic of Brazil, and Hungary.

¹⁰ ICC-01/18-12 at para. 43.

¹¹ ICC-01/18-12 at para. 138.

in light of the Montevideo criteria is not possible within the limited confines of this brief. Notwithstanding, the Applicant will comment on the two principal criteria raised in the Prosecutor's Request; (i) the issue of effective government and (ii) the issue of Palestine's "defined territory".

(i) Effective Government

8. The Prosecutor frankly admits that the so-called State of Palestine does not have full control over the West Bank, [East] Jerusalem and Gaza.¹² In order, therefore, to compensate for what may be perceived as a serious deficit in the established legal requirement of effective government for the existence of statehood, the Prosecutor cites the infringement of the Palestinian people's internationally recognized right to self-determination as a reason for relaxing this requirement. Notwithstanding, the Prosecutor fails to present a convincing or established legal basis for adopting such a radical approach under international law or in relation to the Israeli-Palestinian conflict. According to the Prosecutor, a people's right to self-determination may be determinative of statehood particularly in the context of decolonization.¹³ Yet the right to self-determination, notwithstanding the Prosecutor's misplaced reference to decolonization in the Israeli-Palestinian context, does not by itself equate to statehood or, as argued hereinafter, predetermine its ultimate territorial scope. Indeed, both the express provisions of the Israeli-Palestinian peace agreements, as well as the sentiment of the international community at large, clearly establish that such questions remain a matter for bilateral negotiations.¹⁴

¹² ICC-01/18-12 at para. 5

¹³ ICC-01/18-12 at para. 141. Ironically, in support of this aspect of her request, the Prosecutor cites the academic – Professor Malcolm Shaw who, himself, in his request for amicus curiae status in the present litigation, has submitted that the “Prosecutor's request has elided various factual and legal questions so as to produce a conclusion that may not accurately flow from the accepted principles of international law” and that “it cannot be properly concluded that the Court has territorial jurisdiction” (see ICC-01/18-48 at para. 7).

¹⁴ See The Memorandum of the Israel Attorney-General, pp. 13-14, 25-27 (detailing widespread views of States in this regard) and citing Cassese : “there is no agreement ... on the exact territory in which the [Palestinian] right to self-determination is to be exercised”, that “[t]he only indications that can be drawn from the international legal rules and UN resolutions are to the effect that the right must be exercised peacefully, that is , through negotiations between all the parties concerned and on the basis of the freely expressed wishes of the populations

9. The Prosecutor also contends that Palestine “*has been bilaterally recognized by at least 138 States*”.¹⁵ Notwithstanding the better view under international law that recognition is declaratory and does not displace the established criteria for statehood, the overwhelming majority of the alleged recognitions of Palestine were, in fact, made in connection with the Palestinian Declaration of Independence in 1988, which even the Palestinians have conceded did not establish statehood.¹⁶ Indeed, as already mentioned, many of the States that are claimed to have “recognized” Palestine have made it clear that they do not acknowledge a Palestinian State to be in existence,¹⁷ while others continue to refer to Palestinian statehood as an aspiration for future fulfilment,¹⁸ such that the Prosecutor's assertions in this regard may be viewed as highly questionable.

10. The fact of Palestine’s purported accession to the treaties cited by the Prosecutor and its “*demonstrated capacity to conduct itself in the international scene*”, also fails to substantiate recognition of statehood and is unsupported by the facts.¹⁹ Moreover, such assertions are regularly undermined by rhetoric emanating from the most senior Palestinian leadership whereby Palestinian statehood is deemed a future goal:

“Three years after “Palestine’s” purported accession to the Rome Statute, for example, President Abbas stated in explicit terms that “[i]n due time there will be a Palestinian State but this will not happen soon. We are building the Palestinian State one step at a time, and this takes time”. Palestinian Prime

of the territories”. See also the applications for leave to submit Article 103 observations submitted by States such as Germany, Austria and the Czech Republic (For example, *per the* German application, p. 5 “*it is Germany's consistent position that a Palestinian State, and the determination of territorial boundaries can be achieved only through direct negotiations between Israelis and Palestinians*”).

¹⁵ ICC-01/18-12 at para. 128.

¹⁶ Memorandum of the Attorney-General, p. 27 (noting, *inter alia*, that in their written submission to the ICJ in *Wall Advisory Opinion*, the Palestinians acknowledged that a Palestinian State was yet to emerge).

¹⁷ This includes States such as Australia, Cameroon, Denmark, France, Germany, Japan, Mexico, Netherlands, Norway, Panama, Singapore, South Korea, Switzerland, the United Kingdom and the United States.

¹⁸ *Ibid* (citing, for example, Statements by India, China and Russia). It is noteworthy that in the context of the 19(3) proceedings initiated by the OTP, even States that are said to have recognized “Palestine” such as Brazil, Uganda and Hungary, have noted their objections to the Court's jurisdiction and their view that Palestinian statehood is doubtful or overly contested and that territorial boundaries can only be determined by negotiations.

¹⁹ Memorandum of the Israeli Attorney-General at page 28.

Minister Hamdallah (as he then was) similarly stated as recently as in January 2019 that “the very inception of a sovereign Palestinian state” has yet to happen, and that “... the Palestinians have already prepared the institutional and legislative infrastructure that could be put in service as a basis for the future Palestinian State”.”²⁰

11. Accession to the various treaties cited by the Prosecutor cannot be compared to accession to the Rome Statute which is unique in the sense that its proper implementation requires active and meaningful cooperation which, ultimately, has the capacity to impact on the liberty of the individual. In particular, it should be ascertained whether Palestine even has the power to implement the cooperation requirements of Part 9 of the Rome Statute over those territories which, according to the Prosecutor, fall within its territorial jurisdiction. In the Applicant’s view, the forms of cooperation listed in, but not limited to, Articles 92 and 93 of the Rome Statute would be impossible in light of the Prosecutor’s own acknowledgment that the Palestinian Authority, as the effective signatory to the Rome Statute, lacks any control over the Gaza Strip and most of the West Bank – including [East] Jerusalem.

(ii) *Territory*

12. The Applicant submits that the Prosecutor’s method for determining territorial jurisdiction in this context is not only inconsistent with international law but is also demonstrably inconsistent with her own approach in other situations. In her *Report on Preliminary Examinations Activities for 2019*, for example, the Prosecutor clarifies that the term “territory” under Article 12 of the Rome Statute refers to “the areas over which a State exercises **exclusive and complete authority**” [emphasis added]²¹ describing this interpretation as being “consistent with the meaning of the term under international law”.²² It is, thus, somewhat perplexing that the Prosecutor should now seek to water-down

²⁰ The Israel Attorney General’s Memorandum at footnotes 113 and 114 which cites numerous examples of self-contradictory speech.

²¹ Office of the Prosecutor, Report on Preliminary Examination Activities 2019, paras. 47-48 (5 Dec. 2019), available at <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>.

²² *ibid.*

the emphatic nature of this assertion by raising the issue of territorial entitlement which, according to her, arises out of the principle of self-determination.²³ Territorial entitlement is not determinative of jurisdiction and the resort to arguments arising out of the principle of self-determination is symptomatic of the Prosecutor's present inclination purposefully to bend the rules of classical legal theory on the matter of statehood.

13. In paragraph 192 of her request, the Prosecutor draws a distinction between the statehood requirement of objectively recognized geographical boundaries and what she appears to classify as a subjectively delimited territorial zone which does not “*presuppose a determination of Palestine's borders as such*” but, rather, sets out where “*the Prosecutor may conduct her investigations into alleged crimes while demarcating its outer scope in view of the territory of other States*”. Such a mechanism for surmounting the lack of the Montevideo criterion for a “defined territory” is not just artificial but lacks precedent in customary international law. The Applicant contends that the more commonly accepted view – even the view espoused by the Palestinian hierarchy – is that there is no settled Palestinian territory over which sovereign rights may be exercised, notwithstanding the delegation of certain administrative powers explicitly accorded to the Palestinian Authority in the peace agreements which it has signed with Israel. In his letter dated 23 September 2011 to the Secretary General of the United Nations, Mahmoud Abbas – the Chairman of the Executive Committee of the Palestine Liberation Organization, while purporting to make an application for full membership of the United Nations, emphasized that the “*Palestinian leadership stands committed to resume negotiations on all final status issues — Jerusalem, the Palestine refugees, settlements, borders, security and water — on the basis of the internationally endorsed terms of reference,*

²³ ICC-01/18-12 at para. 193 *infra*.

*including the relevant United Nations resolutions, the Madrid principles, including the principle of land for peace, the Arab Peace Initiative and the Quartet Roadmap”.*²⁴

14. The highest Palestinian representative himself has thus acknowledged that territorial boundaries, settlements and the status of [East] Jerusalem – all of which are pertinent to the Prosecutor’s Request - will remain subject to future determination through various peace initiatives. In the interim, and until the resolution of these “final status” issues, the Applicant will submit that the Palestinian authorities’ jurisdiction over criminal matters on the West Bank is limited and confined only to those situations envisaged by the Oslo Accords. Such jurisdiction would not entitle the Palestinian authorities to delegate issues pertaining to the alleged criminal responsibility of Israeli officials to the International Criminal Court.

(iii) Delegated Jurisdiction

15. The Prosecutor argues that the Oslo Accords only constrain the exercise of Palestinian jurisdiction in the West Bank, [East] Jerusalem and Gaza, but not in the international arena. The Prosecutor further submits that the Oslo Accords may not be interpreted as denying the protection of the 4th Geneva Convention which would include the ability to ensure the accountability of individuals committing grave breaches thereof. According to the Prosecutor, even if the Oslo Accords may be interpreted to exclude from the Palestinian Authority’s jurisdiction the ability to prosecute Israelis for grave breaches of the 4th Geneva Convention or to delegate such a duty to an international tribunal, they cannot bar the exercise of the Court’s jurisdiction over such crimes.

²⁴<https://unispal.un.org/UNISPAL.NSF/5ba47a5c6cef541b802563e000493b8c/f6cf1ed25a5d8fe9852579170050c37f?OpenDocument>

16. The Applicant disagrees with the aforementioned reasoning. The Prosecutor's argument for the International Criminal Court's residual jurisdiction over international crimes is premised on a faulty interpretation of the Oslo Accords. For all jurisdictional matters concerning criminal affairs in the West Bank and Gaza, those matters not transferred to the Palestinian Authority remain, as with Jerusalem and the settlements, under the sole control of Israel.:

- *"the criminal jurisdiction of the [Palestinian Authority] covers all offenses committed by Palestinians and/or non-Israelis in the Territory subject to the provisions of this Article. For the purposes of this Annex, 'Territory' means West Bank territory except for Area C..., and Gaza Strip territory except for the Settlements and the Military Installation Area".²⁵*

17. To clarify, the Palestinian Authority was afforded limited criminal jurisdiction over Palestinians and/or non-Israelis in the West Bank and Gaza. The Palestinian Authority, however, has never had any jurisdiction *ratione personae* (including prescriptive jurisdiction) over Israelis which, in accordance with the complementarity regime of the Rome Statute, it may delegate to the International Criminal Court - either prior to the Oslo Accords or thereafter.²⁶ To quote the words of the Israeli Attorney-General: *"it is legally impossible for it [the Palestinian entity] to delegate any such jurisdiction to the Court; nemo plus iuris transferre potest quam ipse habet (no one can transfer a greater right than he himself has)".²⁷*

²⁵ Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip at Annex IV art. I(1)(a).

²⁶ See Memorandum of the Israel Attorney General at para. 59: *"To be clear, the Palestinians did not have any jurisdiction – prescriptive, adjudicative or enforcement – prior to entering into the bilateral agreements with Israel. Jurisdiction over Israeli nationals, Area C and Jerusalem is thus not something the Palestinian entity previously possessed and the subsequently agreed to limit the exercise thereof...Even an expansive approach to delegation that emphasizes the possession of prescriptive jurisdiction where the exercise of adjudicative and enforcement jurisdiction is curtailed, would thus still run up against the criminal jurisdictional capacity held by the Palestinian entity".*

²⁷ Newton, M. A., *How the International Criminal Court Threatens Treaty Norms*, 49 Vand. J. Transnat'l L. 371 (2016); *"Treaty negotiators 'expressly rejected efforts to confer jurisdiction to the ICC based on its aspiration to advance universal values or a self-justifying teleological impulse to bring perpetrators to justice. Rather, its jurisdiction derives solely from the delegation by States Parties of their own sovereign prerogatives. In accordance with the ancient maxim nemo plus iuris trasferre quam ipse habet, States cannot transfer jurisdictional authority to the supranational court that they themselves do not possess at the time of the alleged offenses. Upon ratification of the Rome Statute, both Afghanistan and Palestine conveyed jurisdiction to the Court, but the scope of that delegation is limited by their pre-existing treaty-based constraints".*

18. The Applicant invites the Pre-Trial Chamber to review a judgment of the Jerusalem District Court rendered in 2017 which, *inter alia*, ruled on the limited nature of the Palestinian Authority's legislative powers under the Oslo Accords:

"It seems that the respondent's witness, Dr. Ahmad Barak who was 'Military Attorney General in the Nablus district' at the relevant time, until 2000, and ever since is 'Deputy to the Attorney General of the Palestinian Authority' (art. 2-3 of his deposition from 15.1.13), agreed, in principle, that the PA legislative power derives from the Oslo Accords He stated in art. 4 of his deposition from 15.1.13 that '... the legal authority of the PA's courts originates from the Oslo Accords ... and we as the PA are bound, and do enforce, what has been agreed under this part of the international agreements'...."

...

"... it is worth recalling art. XVIII(4)(a) of the Interim Agreement, which clearly and unequivocally delimits the legislative powers of the Palestinian Council [i.e. the PA] ... : 'Legislation, including legislation which amends or abrogates existing laws or military orders, which exceeds the jurisdiction of the Council or which is otherwise inconsistent with the provisions of the DOP, this Agreement, or of any other agreement that may be reached between the two sides during the interim period, shall have no effect and shall be void ab initio'...."

....

"In any event, the expert on behalf of the respondent, Dr. Ahmad Barak ... agrees that the respondent's legislative powers are limited. Addressing, inter alia, the Palestinian Basic Law ...[and] quoting from the transcript of the oral hearing, p. 776 (line 20) – p. 777 (line 15)):

'The Court: Do the Oslo Accords bind PA Officials?

The witness: Yes, of course. Because the Oslo Accord equals law. The Oslo Accords are above the Law'."

.....

"In any event, as was also stated by the Deputy Attorney General of the PA, there is no question that the PA's legislative power was granted to it by the Interim Agreement. For this reason, its legislative powers are also limited under these Agreements".²⁸

²⁸ Case No. 5074/03 *Israel Attorney-General & 17 others v. Palestinian Authority* (Apr. 24, 2017), https://www.nevo.co.il/psika_html/mechozi/ME-03-5074-1.htm) at paras. 258, 263, 438 & 440.

19. To misconstrue the agreements which provided the Palestinian Authority with powers of self-government which they did not previously exercise as, somehow, contradicting the 4th Geneva Convention, does a disservice to the legal history of the Israeli-Palestinian conflict and serves as a disincentive to negotiated peace efforts.

Conclusion

20. The Applicant is of the opinion that the Prosecutor has avoided established international law in order to construct a convoluted, artificial and politically-motivated theory for initiating an unwarranted investigation principally targeting Israel which is not a State Party to the Rome Statute and enjoys the protection of article 34 of the Vienna Convention on the Law of Treaties.

21. Accordingly, the Applicant respectfully requests the learned Pre-Trial Chamber to receive the aforementioned submissions and to rule as follows:

- i) that the referral is without legal effect - not least because Palestine does not meet the definition of a "State" under Article 12(2)(a) of the Rome Statute even within the parameters asserted by the Prosecutor, and consequently;
- ii) that the Court may not exercise its jurisdiction over the West Bank, Gaza and [East] Jerusalem.



Avi Himi,
President, The Israel Bar Association

Done this 16th day of March, 2020.
Tel Aviv, Israel